

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

FRIDAY, THE 6TH JULY 2007 / 15TH ASHADHA 1929

SA.No. 161 of 1994()

**(AGAINST JUDGMENT AND DECREE IN AS.42/1991 ON THE FILE OF THE
SUBORDINATE JUDGE'S COURT, SULTHAN BATHERY DATED
9TH FEBRUARY, 1993 AGAINST JUDGMENT AND DECREE IN
OS.393/1992 ON THE FILE OF THE MUNSIFF'S COURT,
KALPETTA DATED 22/11/1990)**
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APPELLANT: APPELLANT:PLAINTIFF:

**PODDAR PLANTATIONS LIMITED.,
RIPON ESTATE, MUPPAINAD VILLAGE,
VYTHIRI TALUK, REPRESENTED BY ITS GROUP MANAGER.**

**BY ADV. SMT.T.D.RAJALAKSHMI
SRI.E.R.VENKATESWARAN**

RESPONDENTS: REPENDENTS:DEFENDANTS:

- 1. KADEEJA, D/O. ALAVIMULLA, RESIDING AT RIPON,
MEPPADI POST, MUPPAINAD VILLAGE, VYTHIRI TALUK.**
- 2. CHAMPAN MUHAMMED, RESIDING AT RIPON,
MEPPADI POST, MUPPAINAD VILLAGE, VYTHIRI TALUK.**

BY

**THIS SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 06/07/2007, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

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S.A.NO.161/1994

J U D G M E N T

Appellant called. Absent. No representation. Appeal is dismissed for default.

6th July, 07

Sd/- M.Sasidharan Nambiar, Judge

/True Copy/

P.S.to Judge

M.SASIDHARAN NAMBIAR, J.

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S.A. NO. 161 OF 1994

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Dated this the 26th day of 2007

JUDGMENT

Plaintiff in O.S.393/1982 on the file of Munsiff Court, Kalpetta is the appellant. Respondents are the defendants. Appellant Company instituted the suit seeking a decree for recovery of possession of plaint B schedule property on the strength of their title. It was contended that plaint B schedule property forms part of plaint A schedule property and Plaint A schedule property belongs to the Company under Ext.A1 title deed dated 11.1.1973 and plaint B schedule property was trespassed and reduced into their possession by respondents and therefore appellant is entitled to recover possession of plaint B schedule property on the strength of title. Originally only first respondent was impleaded. First respondent in her written statement contended that she is not in possession of the property and 2 ½ acres of land is

in the possession of second respondent her brother and therefore suit is barred for non-joinder. Second respondent was therefore impleaded as second defendant. Second defendant in his written statement contended that appellant has no title to the plaint B schedule property and it was not a trespassed property. According to second respondent, plaint B schedule property was obtained by his father from E & S Company as per an oral lease in 1961 and since then his father was in possession of the property as cultivating tenant and subsequently father handedover possession of the property to second respondent and he is in possession of the property and is entitled to fixity of tenure and therefore appellant is not

entitled to a decree for recovery of possession. It was also contended that even if appellant has title to the property, it is barred by adverse possession and limitation.

2. The question of tenancy raised by second respondent was referred to Land Tribunal under section 125(3) of Kerala Land Reforms Act. The Land Tribunal rendered finding that second respondent is not a tenant entitled to fixture of tenure. Thereafter on the side of the appellant PW1 was examined and on the side of respondents second respondent was examined as DW1. Ext.A1 and Exts.B1 to B6 and Exts.C1 and C2 were marked. On the basis of report submitted by Commissioner, appellant got amended the survey number of the

plaint A and B schedule properties as well as the boundary of plaint B schedule property. Learned Munsiff on the evidence found that though second respondent is not a tenant entitled to fixity of tenure, appellant has title to the property covered under Ext.A1 but failed to prove that plaint B schedule property forms part of plaint A schedule property. Therefore suit was dismissed. Appellant challenged the decree and judgment before Sub Court, Sulthanbathery in A.S.42/1991. Second respondent challenged the finding against him by filing a Cross objection. Learned Sub Judge on reappreciation of evidence found that plaint A schedule property was not identified and it is not established that plaint B schedule property forms

part of plaint A schedule property. It was therefore held that appellant is not entitled to the decree for recovery of possession. In the cross objection learned Sub Judge confirmed findings of the Land Tribunal that second respondent is not a tenant entitled to fixity of tenure. The findings of learned Munsiff with regard to the identity and boundaries of plaint B schedule property was confirmed. The appeal was dismissed. It is challenged in the second appeal.

3. The appeal was admitted formulating the following substantial questions of law.

1) Whether on the facts and circumstances of the case, plaintiff is entitled to a decree for recovery of possession of plaint B schedule

property on the strength of title?

2) As the defendants are precluded from challenging the title of appellant, whether courts below were justified in not granting the decree for recovery of possession?

4. Learned counsel appearing for appellant was heard.

5. Notices were served on respondents. They did not appear or contested the appeal.

6. The specific case of the appellant in the plaint itself was that plaint B schedule property forms part of plaint A schedule property and plaint A schedule property was obtained under Ext.A1 title deed from E & S Company. Even second respondent, who alone contested the suit, admitted that plaint

B schedule property originally belonged to E & S Company. Though second respondent contended that there was an oral lease by E & S Company in favour of his father and subsequently father handedover possession to second respondent and thus he is entitled to fixity of tenure, Land Tribunal on the evidence found that second respondent is not a tenant entitled to fixity of tenure, first appellate court on reappreciating the evidence found that there is no evidence to prove the oral lease and confirmed the finding of the Land Tribunal that second respondent is not a tenant entitled to fixity of tenure. The trial court and first appellate court also accepted the case of appellant that he has title to the property covered

under Ext.A1. But appellant was non-suited on the ground that there is no evidence to prove that plaint B schedule property forms part of plaint A schedule property.

7. Courts below noted that originally plaint schedule properties were shown as comprised in survey Nos.760/1A,760/1B, 760/1C and 760/2 and after Ext.C1 report and C2 plan were submitted before the court, plaint was amended showing the survey numbers 1132/2A1A1 as well as the boundaries of plaint B schedule property reported by the Commissioner being the property in the possession of second respondent. Learned counsel pointed out that before the trial court, appellant filed an application to remit the report back to the

Commissioner to note the correct survey number of the property as there was a subsequent sub division and the properties are now in survey No.1132/2A1A and 1132/2A1AB but the application was dismissed holding that properties can be identified by the boundaries.

8. On hearing learned counsel appearing for appellant it is clear that the crucial question is whether plaint B schedule property forms part of plaint A schedule property. When second respondent is also admitting the title of E & S Company and under Ext.A1, E & S Company transferred their right covered under Ext.A1 in favour of the appellant, title of appellant to the property covered under Ext.A1 cannot be disputed. The only

pertinent question is whether plaint B schedule property forms part the property covered under Ext.A1, as described in plaint A schedule.

9. As rightly found by courts below, appellant is not entitled to get a decree for recovery of possession of plaint B schedule proeprty, unless it is established that plaint B schedule property forms part of plaint A schedule property belonging to appellant under Ext.A1. Ext.C1 report and C2 plan submitted by the Commissioner shows that he only identified and demarcated the property in the possession of second respondent. No attempt was made to get plaint A schedule property identified with reference to Ext.A1, or to find out whether plaint B schedule

forms part of that property. Learned counsel appearing for appellant submitted that an opportunity may be granted to the appellant to take out a Commission to identify plaint A schedule property and establish that plaint B schedule property forms part of plaint A schedule property. Considering the contentions raised, interest of justice warrants that suit is to be remanded to the trial court to enable appellant to take out a Commission and establish that plaint B schedule property forms part of plaint A schedule property as it is the property covered under Ext.A1.

Appeal is allowed. The decree and judgment passed by the Munsiff in O.S.393/1982 which was confirmed by the Sub Court in A.S.42/1991 are set

aside. O.S.393/1982 is remanded to Munsiff, Kalpetta with a direction to dispose the suit afresh after granting opportunity to the appellant to take out a Commission and establish that plaint B schedule property forms part of plaint A schedule property obtained under Ext.A1. The trial court has to direct the Commissioner to be appointed at the expense of the appellant, to identify plaint A schedule property with the assistance of a Taluk Surveyor and demarcate plaint B schedule property and decide whether plaint B schedule property forms part of plaint A schedule property. If it forms part of plaint A schedule property, learned Munsiff to decide whether appellant is entitled to a decree for recovery of possession on the strength of

title. Parties are directed to appear before the Munsiff on 5.9.2007. It is made clear that as the respondents did not appear before this court, Munsiff has to issue summons to the second respondent for his appearance.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006